80-423

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER 1980 TERM

CASE NO. A-46

J. G. CHISM, Petitioner

v.

NORFOLK AND WESTERN RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

HERBERT L. BERNSTEEN
DEBORAH PURCELL GOSHIEN
75 Public Square, Suite 712
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QUESTION PRESENTED

Whether, in a case brought in state court under the Federal Employers Liability Act and Boiler Inspection Act, the state court may refuse to apply federal law which requires submission of the question of liability under the Boiler Inspection Act to the jury, but may instead withdraw that question from the jury, thus creating a conflict between cases tried in a federal court and cases tried in a state court under the same federal act.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED BY THE APPEAL	ii
TABLE OF AUTHORITIES	
Cases	ii
Statutes	iii
REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS	iii
STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED	1
STATUTES	2
STATEMENT OF THE CASE	2
STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL	5
CERTIFICATE OF SERVICE	14
APPENDIX	15
Order of trial court	16
Notice of appeal	17
Opinion of Court of Appeals	18
Notice of appeal to Supreme Court of Ohio	35
Judgment of Ohio Supreme Court denying motion to certify record	36
Order extending date for petition of certiorari to September 12, 1980	37
Statutes	38
—45 U.S.C. Section 51-60, FEDERAL EMPLOYERS LIABILITY ACT	38
—45 U.S.C. Section 22-34, BOILER INSPECTION ACT	44

QUESTION PRESENTED BY THE APPEAL

Whether, in a case brought in state court under the Federal Employers Liability Act and Boiler Inspection Act, the state court may refuse to apply federal law which requires submission of the question of liability under the Boiler Inspection Act to the jury, but may instead withdraw that question from the jury, thus creating a conflict between cases tried in a federal court and cases tried in a state court under the same federal act.

TABLE OF AUTHORITIES

Cases

	PAGE
Batton v. Atlantic Coast Line R. Co., 212 N.C. 256, 193 SE 674 (1937)	6
Bolan v. Lehigh Valley Railway Company, 167 F2 934 (USCA-2, 1948)	8
Delevie v. Reading Company, 176 F2 495 (CA-3, 1949)	10
Draper v. Erie Railroad Company, 183 F.Supp. 899 (USDC WD Pa. 1960)	8, 13
Fritts v. Toledo Terminal Railroad Company, 293 F2 361, 1 (USCA-6, 1961)	11
Gowins v. Pennsylvania R. Co., 209 F2 431 (CA-6, 1962) cert. den. 371 US 824, 83 S.Ct. 44, 9 L.Ed2d 64 (1962)	6
Jacobs v. Reading, 130 F2 612 (CA-3, 1942)	6
Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946)	8
Lilly v. Grand Trunk Western Railroad, 317 U.S. 481 (1943)	7
Louisville & N. R. Company v. Botts, 173 F2 166, (USCA-8, 1949)	10

PAGE

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 421 77 S.Ct. 443, 459, 1 L.Ed2d 493, 515 (1957), rehearing denied 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed2d 764 7

St. Louis Southern Railway v. Williams, 397 F.2d 147 (CA-9, 1968) 9

Seaboard Coast Line Railroad Company v. Jackson, 256 So.2 568 (Fla. 1971) 9

Sederquist v. Chicago R. I. & P. R. Co., 268 SW2 861 (MO. 1964) 8

Siegrest v. Delaware, L. & W. R. Co., 263 F2 616 (CA-2, 1959) 6

Slaughter v. Atlantic Coast Line R. Co., 112 US App. DL. 327, 302 F2d 912 8 ALR3d 43 6 (1962), Cert. den. 371 US 827, 83 S.Ct. 48, 9 L.Ed2d 65 6

South Buffalo R. Co. v. Ahern, 344 US 367, 72 S.Ct. 340, 97 L.Ed. 395 (1952) 6

Wilson v. Pennsylvania Railway Company, 141 F.Supp. 233 (US DC WD Pa. 1956) 9

Whelan v. Penn Central Company, 503 F2 886 (USCA-2, 1971) 11

Statutes

FEDERAL EMPLOYERS LIABILITY ACT OF 1908, 42 U.S.C. Section 51-60 38

BOILER INSPECTION ACT, 45 U.S.C. Section 22-34 44

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

This case is unreported.

In The
Supreme Court of the United States
OCTOBER 1980 TERM

CASE NO. A-46

J. G. CHISM, Petitioner

v.

NORFOLK AND WESTERN RAILWAY COMPANY

JURISDICTIONAL STATEMENT ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petition for Writ of Certiorari is requested because the court of last resort in Ohio has, by declining jurisdiction on plaintiff's appeal, decided a federal question in a way that is in conflict with applicable decisions of this court and with appropriate federal law.

This is an appeal from the state court of last resort in Ohio which denied plaintiff's motion for an order directing the court of appeals for Cuyahoga County to Certify its Record after plaintiff had appealed the decision of the Cuyahoga County Court of Appeals which had affirmed the trial court's judgment in favor of defendant railroad.

The final judgment of the 8th District Court of Appeals, Cuyahoga County, Ohio, was entered on January 4, 1980.

A motion to the Ohio Supreme Court for an order directing the Court of Appeals for Cuyahoga County to Certify its Record was denied on May 1, 1980.

On July 17, 1980 this Court by order extended the time for filing a petition for a writ of certiorari to and including September 12, 1980.

STATUTES

45 U.S.C. Section 51-60, FEDERAL EMPLOYERS LIABILITY ACT

45 U.S.C. Section 22-34, BOILER INSPECTION ACT

STATEMENT OF THE CASE

Petitioner, a locomotive engineer employed by defendant railroad filed a complaint and jury demand in Common Pleas Court, Cuyahoga County, Ohio, alleging jurisdiction under the Federal Employers Liability Act of April 22, 1908 and the Federal Boiler Inspection Act. Petitioner alleged that he was injured on May 18, 1978 while in the course of his duties as locomotive engineer in interstate commerce when he was struck on the head and injured by foreign objects which were able to enter and cause the injury because an opening in the locomotive was unlawfully created by the removal of a locomotive bay window. Petitioner alleged that the bay window was a part or appurtenance of the locomotive, and its premature removal by the railroad in violation of the contract between the Railroad and the Union put petitioner in danger and unnecessary peril in direct violation of the Boiler Inspection Act and of the requirements under F.E.L.A. to provide a safe place in which to work.

Prior to trial no motion was made to dismiss jurisdiction under the Boiler Inspection Act, nor was the issue considered by the court sua sponte.

Plaintiff submitted a legal memorandum to the trial court on the F.E.L.A. and Boiler Inspection Act and its application to the within case prior to trial as per the trial court's instructions to submit a trial brief. No ruling was made at this time on the applicability of the Boiler Inspection Act.

Just prior to the beginning of trial the court instructed the attorneys that no mention was to be made to the jury of the Boiler Inspection Act or of its provisions in regard to absolute liability, either in opening statements or at any time afterwards. Plaintiff objected and was overruled.

A jury trial was then had beginning June 26, 1979 and ending June 30, 1979.

Petitioner presented evidence that he was a locomotive engineer employed by defendant railroad and that his ordinary duties were in interstate commerce.

While operating a locomotive in interstate commerce on May 18, 1976 on the west side of Cleveland he observed trespassers throwing rocks and reported this to the railroad. The railroad did not respond. Shortly after the vandals were seen, and further along the route in an area known to be frequented by trespassers, he was struck on the head and injured by thrown foreign objects. His injury was made possible because the thrown objects were able to enter the locomotive and strike him due to the absence of the bay window, a protective device fastened to the locomotive from October to June of each year by contract with the union since February 3, 1959, and in use many years before that. The bay window permitted the locomotive engineer to put his head out of the locomotive for visibility and remain protected from foreign objects or weather.

The premature removal of the bay window by the railroad violated the contract and put petitioner in peril.

Petitioner further presented evidence that the vandalism occurs often, had recently gotten worse and is more

frequent in the summer months from West 25th Street to Rocky River, the area of petitioner's injury.

Petitioner rested.

The defendant railroad presented evidence that the bay windows are protective devices and are provided under contract dated February 3, 1959, from October to June of each year and were originally requested in the year 1955. The railroad testified that 26 complaints were received in May, 1976 on account of the bay windows being improperly removed and that the railroad had received criticism for not living up to the agreement.

The railroad further testified that the bay windows were no longer an experimental device as of May 18, 1976 even though they may have been at one time.

The railroad police captain testified that vandalism has been up 25 percent in the last 25 years, that complaints are concentrated at certain times of the day and in warm weather, and that they do not put more men on in the hour of complaints, and that there is nothing the railroad can do about vandalism.

Defendant rested.

On rebuttal petitioner presented evidence that there is a penalty for premature removal of the bay window, and other evidence.

Both sides rested.

Oral argument was had on the requests for jury instructions and on motions.

Petitioner requested instructions to the jury on liability under the Boiler Inspection Act demanding that the issue of liability under the Boiler Inspection Act be decided by the jury. Defendant argued that the bay window was not a part or appurtenance. Petitioner's instruction and demand was refused, the court giving no reason.

The case was submitted to the jury under the F.E.L.A. only, with no charge on the Boiler Inspection Act, the court thereby having withdrawn from the jury the issue of liability under the Boiler Inspection Act.

The jury found for the defendant.

Petitioner appealed to the 8th District Court of Appeals, Cuyahoga County, Ohio on the issue of the court's refusal to permit the jury to consider liability under the Boiler Inspection Act, and on other issues.

The appeal was overruled by the 8th District Court of Appeals on January 4, 1980.

In its opinion, the Court of Appeals reviewed the evidence, stated on p. 4 that "There was conflicting testimony as to whether these (bay windows) were also provided for the purpose of keeping thrown objects away from the engineers", but concluded that the bay window was not an appurtenance.

Petitioner then filed a notice of appeal to the Supreme Court of Ohio and motion to certify the record on February 4, 1980, which motion was dismissed by the Supreme Court of Ohio on May 1, 1980, whereupon petitioner is proceeding herein.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The issue of what law to follow in a Boiler Inspection Act case being tried in a state court, must be laid to rest, as it vitally affects the plaintiff's right to pursue remedies provided for him by Congress as a railroad employee in interstate commerce.

State and federal courts cannot be inapposite on the interpretation of a right to a jury under a federal statute when such federal statute by its own terms is the exclusive remedy for a railroad employee injured in the course of his job in interstate commerce.

Actions under the F.E.L.A. may be brought in either the federal courts or in state courts, the choice of forum being the plaintiff's, but regardless of forum, the F.E.L.A. supersedes state statutes and operates uniformly through-

out the country. *South Buffalo R. Co. v. Ahern,* 344 US 367, 72 S.Ct. 340, 97 L.Ed. 395 (1952).

The federal Boiler Inspection Act is tantamount to an amendment to the F.E.L.A. and is subject to the same construction. *Gowins v. Pennsylvania R. Co.,* 209 F2 431 (CA 6, 1962) cert. den. 371 US 824, 83 S.Ct. 44, 9 L.Ed2d 64 (1962).

Since the avowed purpose of the Boiler Inspection Act is to provide for the safety of the employees, the act places an absolute duty upon the railroad to maintain the locomotive and all of its parts and appurtenances in a safe condition to operate to avoid peril to the employee, eliminating the need for the plaintiff to prove negligence when he can show that a defective condition in any part or appurtenance of the locomotive contributed to his injury. Therefore the importance of the issues herein are magnified, and the need for uniformity is essential because under the Boiler Inspection Act there is absolute liability regardless of fault and all cases must be tried under the same exclusive statutes.

In an F.E.L.A. case tried in a state court, it is well established that matters of substance are controlled by federal law. *Batton v. Atlantic Coast Line R. Co.,* 212 N.C. 256, 193 SE 674 (1937), cert. den. 303 US 651, 58 S.Ct. 750, 82 L.Ed. 1112. *Jacobs v. Reading,* 130 F2 612 (CA 3, 1942).

Furthermore, negligence under these acts is different and more liberal than state or common law, and for that reason also must always be determined by federal law, not state law. *Siegrest v. Delaware, L. & W. R. Co.,* 263 F2 616 (CA 2, 1959), Cert. den. 360 US 917, 79 S.Ct. 1435 L.Ed2d 1533; *Slaughter v. Atlantic Coast Line R. Co.,* 112 US App. DL. 327, 302 F2d 912 8 ALR3d 43 6 (1962), Cert. den. 371 US 827, 83 S.Ct. 48, 9 L.Ed2d 65.

The jury has always played an important part in F.E.L.A. – Boiler Inspection Act cases, and in such cases

the determination of negligence, violation of statute and proximate cause under federal law is strictly a function of the jury and may not be taken away. *Lilly v. Grand Trunk Western Railroad,* 317 U.S. 481 (1943); 45 U.S.C.A. Sec. 54; *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500, 421 77 S.Ct. 443, 459, 1 L.Ed2d 493, 515 (1957), rehearing denied 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed2d 764.

For instance, in *Lilly v. Grand Trunk Western Railroad,* the United States Supreme Court undertook to consider the very same issue of the submission of the question of liability to the jury. Defendant railroad, after a plaintiff's verdict, challenged the trial court's submission to the jury and demanded a judgment notwithstanding the verdict on the basis that all questions of violation of the Boiler Inspection Act should have been removed from the case because there was no evidence of negligence and in any event plaintiff assumed the risk in a case alleging injuries due to presence of foreign matter on the locomotive. Defendant urged that the act covered defects in construction or mechanical operation, but not from the presence of dangerous objects or foreign material.

In Lilly the plaintiff was injured by a fall from an ice-laden locomotive. Plaintiff had contended that the ice came from a leak. The jury found no leak but still found for the plaintiff under the Boiler Inspection Act.

The Lilly case interpreted the meaning and purpose of the Boiler Inspection Act and made it clear that the Act is without limitation in speaking of any condition which renders equipment unsafe to operate without exposing plaintiff to any hazard or risk.

The United States Supreme Court refused to take away the jury's right to make its decision in regard to the imposition of liability under the Boiler Inspection Act: "The benefits of that rightful determination should not have been taken from him."

In *Bolan v. Lehigh Valley Railway Company,* 167 F2 934 (USCA-2, 1948) the jury found that the railroad did in fact furnish a safe place to work but still found liability under the Boiler Inspection Act and found that the engine and all its appurtenances including the pilot step were in proper condition and safe to operate without unnecessary peril to life and limb. The defendant requested judgment notwithstanding the verdict, but the circuit court found the jury's function inviolate, and allowed that the jury might find that the railroad had generally furnished a safe place to work but still find liability under the Boiler Inpection Act. The circuit court cited *Lavender v. Kurn,* 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946) and found it "immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." The jury is free to draw inferences and to discard or disbelieve whatever facts are inconsistent with its conclusion.

Sederquist v. Chicago R. I. & P. R. Co., 268 SW2 861 (MO. 1964) was tried in a state court which had submitted the case to the jury which found for the plaintiff under the Boiler Inspection Act, and defendant argued that a directed verdict should have been granted. Lilly and other precedents were discussed. The deceased was found injured near a fan with an open hatch cover in a rear engine. The Missouri court states: "It is our belief that whether the death of Sederquist was due to his own sole negligence or was caused by the defendant's violation of the Boiler Inspection Act was a question for the jury," following federal law.

In *Draper v. Erie Railroad Company,* 183 F.Supp. 899 (USDC WD Pa. 1960) the court found that the case was properly submitted to the jury under the Safety Appliance Act and that the court may not arbitrarily substitute its judgment for that of the jury.

In *St. Louis Southern Railway v. Williams,* 397 F.2d 147 (CA-9, 1968), in which a student switchman slipped and fell from oil on the cab, defendant argued on appeal that the district court erred in submitting the case to the jury under the Boiler Inspection Act. The Fifth Circuit found that it was properly submitted to the jury to determine whether the presence of oil on the step of the locomotive constiuted a violation of the Boiler Inspection Act.

Again the Williams defendant tried to limit the Act to defects in construction or mechanical operation rather than the presence of foreign materials and again the history and purpose of the Act was discussed and the court found "no warrant in the language of the Act for construing it so narrowly or for denying the commission power to remedy shortcomings." (p. 149). Defendant argued that a new and intervening cause took the case out of the Boiler Inspection Act, but the reviewing court found that the case was properly submitted to the jury under the Boiler Inspection Act.

In *Wilson v. Pennsylvania Railway Company,* 141 F.Supp. 233 (US DC WD Pa. 1956) the question of whether the railroad failed to furnish an efficient hand brake was determined to be a question of fact for the jury.

A two-way radio which was used for a number of years to facilitate car-switching was found by the jury to be a part or appurtenance under the Boiler Inspection Act in *Seaboard Coast Line Railroad Company v. Jackson,* 256 So.2 568 (Fla. 1971), following federal precedent, over conflicting evidence and over the railroad's objections.

The railroad argued that the Boiler Inspection Act did not apply, that it was not an appurtenance, that it was not required by the Rules, that there was no evidence of defective condition and that it was not the proximate cause of plaintiff's injuries, nor essential to the operation of the locomotives, as cars had beeen switched by hand

signals with no radio earlier the same evening, and that other portable radios were available.

In *Delevie v. Reading Company,* 176 F2 495 (CA-3, 1949) the jury was permitted to consider the location of the reverse gear mechanism as a basis for liability under the Boiler Inspection Act even though the location complied with the then current Interstate Commerce Commission regulations. The defendant railroad argued that it was error to give the jury what amounted to a second guess where the reverse gear should have been installed. The circuit court affirmed that "(t)he Interstate Commerce Commission does not purport to issue a set of regulations so complete and comprehensive that a railroad is need only obey its instructions."

In *Louisville & N. R. Company v. Botts,* 173 F2 166, (USCA-8, 1949) the plaintiff claimed injury due to defective conditions of bolts on a footboard. No regulations existed on the kind or type of bolts used and the defendant contended that the trial court should have found no violation of the Boiler Inspection Act as a matter of law.

The circuit court fully set forth the history and importance of the jury's function in F.E.L.A. and Boiler Inspection Act cases and found that the question of liability under the Boiler Inspection Act must go to the jury:

> "The opinions of the Supreme Court have declared that it is "the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury," Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68 S.Ct. 444, 541, footnote 30, 87 L.Ed. 610, 143 A.L.R. 967; that such cases may not be taken from the jury merely because the question of liability is "close or doubtful", Bailey v. Central Vermont Ry., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "it is not the function of a court to search

> the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences,"

A locomotive, no single part of which is installed or maintained in violation of the Boiler Inspection Act, may still provide an unsafe place to work and so violate the Act.

As is clear from an abundance of case law, it is not necessary for the specific defective condition to be named in the act in order for absolute liability under the Boiler Inspection Act to apply.

The federal courts have never waivered from this standard of liberal interpretation of this law. *Louisville and N. R. Co., v. Botts,* cited above.

The determination as to whether the engine and all its appurtenances is safe for use has always been a question of fact for the jury. *Whelan v. Penn Central Company,* 503 F2 886 (USCA-2, 1971).

Particularly relevant herein to the issue of whether the issue of liability under the Boiler Inspection Act must be given to the jury, and in direct conflict with the within decision is the federal case of *Fritts v. Toledo,* brought in a United States District Court in Ohio and appealed to the Sixth Circuit.

In *Fritts v. Toledo Terminal Railroad Company,* 293 F2 361, 1 (USCA-6, 1961), the trial court directed a verdict for the railroad and against the fireman-plaintiff at the conclusion of his proof in a case brought under F.E.L.A. and Boiler Inspection Act which concerned a freak accident in which plaintiff either fell or was thrown from his seat. The plaintiff presented inconsistent and conflicting evidence.

The trial court became convinced that the plaintiff had not made out a case under the Boiler Inspection Act. However under existing law, the court citing *Lavender v. Kurn,* there had to have been a complete and total lack of

any probative facts at all before the case can be taken from the jury. The Sixth Circuit declared that the trial court had invaded the jury's province and reversed:

> "A jury trial is an integral part of the remedy afforded railroad workers under these statutes and to deprive them of a jury trial in a close or doubtful case takes away much of the relief Congress intended to give them." (p. 363)

The Fritts case is particularly important herein, because it was tried in federal court in Ohio and the within case conflicts directly with the Fritts Sixth Circuit determination, creating a dilemma.

In the within case the state Court of Appeals noted the conflicts in trial testimony, but then concluded that it agreed with the trial court that the bay window was not an appurtenance and therefore it did not disturb the decision below.

The court of appeals did not decide there was no evidence at all on which reasonable minds could differ but to the contrary found there was conflicting testimony. There was no accusation at any time that the case was frivolous or without merit. By affirming the withdrawing of this issue from the jury, Ohio has created an irreconcilable conflict with federal law and the chaotic result that now each of the 50 states could presumably begin to make new law under the F.E.L.A. and Boiler Inspection Act and that such new law need not follow the United States Supreme Court and established federal law. State courts may now presumably come to opposite conclusions from federal courts on the very same issues in the very same state. If a new case is now in federal court in Ohio, it is unclear whether the Chism case or federal law applies.

The jury decides such major issues as whether or not the defendant railroad is a common carrier. Sec. 7-70, Ohio Jury Instructions, Ohio Judicial Conference (1962);

such an issue is similar to deciding whether or not the protective device known as a Bay Window is a part or appurtenance of the locomotive, and the jury must be permitted to retain its established function in cases involving injuries to railroad employees regardless of whether the court itself desires a certain result. *Draper v. Erie Railroad Company,* 183 F.Supp. 899 (USDC Penn 1960).

It is important for this court to resolve conflicts as to the proper function of a jury in cases tried in state courts under the federal Boiler Inspection Act.

CONCLUSION

For the reasons stated above, petitioner urges the granting of the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the within Jurisdictional Statement were served upon defendant Norfolk and Western Railway Company on September 11, 1980 by personally delivering them to attorney Forrest A. Norman, 630 Bulkley Building, Cleveland, Ohio 44115.

DEBORAH PURCELL GOSHIEN

APPENDIX

PROCESSED BY C.S.C./P/C 43-2

CASE NO: 977170

ASSNG. JUDGE James McMonagle 1978

J. G. Chum VS Norfolk & Western Railway Co

OTHER JUDGE

CIVIL CASE STATUS FORM

MOTION

DESCRIPTION

☐ PLTF. ☐ GRT'D.
☐ DEFT. ☐ O. R.
☐ COURT ☐ H & S

DATE / /

SCHEDULE

☐ SCHEDULE ☐ RE-SCHEDULE

☐ JURY TRIAL DATE / /
☐ COURT TRIAL
☐ PRETRIAL TIME
☐ HEARING

REF

☐ 40 ARBITRATION
☐ 20 REFEREE

JE

☐ SUPPLEMENTAL
☐ ATTY. TO SUBMIT

CASE

☐ 03 REASSIGNED
☐ 04 REINSTATED

DISPOSITION

☒ 81 JURY TRIAL ☐ 89 DIS. W/PREJ.
☐ 83 COURT TRIAL ☐ 91 DEFAULT - COGNOVITS
☐ 85 PRETRIAL ☐ 93 TRANSF. TO COURT
☐ 87 DIS. W/O PREJ. ☐ 95 TRANSF. TO JUDGE

☐ PARTIAL ☒ FINAL ☐ POST CARD

POSTED

JOURNAL

DATE 6 3 78 (NUNC PRO TUNC ENTRY AS OF AND FOR / /)

Jury finding for the defendant

Jan McMonagle
JUDGE

COURT REPORTER
NAME
DAYS

CLERK OF COURTS
RECEIVED FOR FILING

JUL 5 1978

GERALD E. FUERST, CLERK
BY W. M. Print DEP.

VOL. 2068 PG 708

THE STATE OF OHIO, Cuyahoga County, ss. I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS, WITHIN AND FOR SAID COUNTY,

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Vol 406 J.G. 708 - Dates July 5, 1978 NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 17th DAY OF March A.D. 1980.

GERALD E. FUERST, Clerk

By [illegible] Deputy

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT

COUNTY OF CUYAHOGA

J. G. CHISM
Plaintiff-Appellant

-vs-

NORFOLK AND WESTERN RAILWAY CO.
Defendant-Appellee

CASE NO. 39697

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff-Appellant hereby appeals to the Supreme Court of Ohio from the final judgment dismissing his appeal entered in this action on January 4, 1980.

DEBORAH PURCELL GOSHIEN
75 Public Square #712
Cleveland, Ohio 44113
621-5435
Attorney for Plaintiff-Appellant

SERVICE

A copy of the within was mailed to Forrest A. Norman, attorney for defendant-appellee, 630 Bulkley Building, Cleveland, Ohio 44115 on February 4, 1980.

DEBORAH PURCELL GOSHIEN
Attorney for Plaintiff-Appellant

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 39697

J. G. CHISM
Appellant

-vs-

NORFOLK AND WESTERN RAILWAY CO.
Appellee

APPEAL FROM COMMON PLEAS COURT

No. 977,170

JOURNAL ENTRY AND OPINION

DATE JANUARY 4, 1980

PARRINO, C. J.:

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant J. G. Chism was injured on May 18, 1976 while he was working as an engineer for appellee Norfolk and Western Railway Company. Appellant sustained an injury to his eye while operating an engine on appellee's tracks in the vicinity of West 42nd Street in the City of Cleveland. Appellant and his crew were dropping off and/or picking up cars from a siding at West 42nd Street. Appellant contends that a number of young children were

throwing stones and gravel at the engine while they were working and that he was struck in the eye by one of the stones. He left work prior to the end of the shift and was treated at a hospital. He later received treatment from the company doctor and an ophthalmologist.

This action was initiated on November 16, 1977 in the Court of Common Pleas. A jury found for the defendant. Appellant appeals that decision, citing eleven assignments of error.

For his first assignment of error, appellant states:

> "1. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE JURY TO CONSIDER LIABILITY UNDER THE BOILER INSPECTION ACT AS PER PLAINTIFF'S PROPOSED INSTRUCTIONS NO. 1 AND PROPOSED DEFINITION OF APPURTENANCE."

Testimony was presented at trial that the engine that appellant was operating on May 18, 1976 was missing at least one of the sliding sashes in the bay window. Appellant did not report this because he felt that he would be required to operate the engine anyway. The bay windows are required to be on the engines from October to June pursuant to a union agreement entered in 1959. The windows are primarily for protection from the weather during the winter months and are required to be removed in the summer months under the terms of the agreement. Although there was some testimony that they also provided protection from thrown objects, there was testimony that the Railroad began removing these in May so that all of them could be removed by June 1. The windows provide a protected area in which the engineer can put his head out the side window in inclement weather. In addition, the windows are provided with sliding sashes in the front and the back so that the engineer can put his head directly outside so that he can see crewmen standing on the ground. These sashes can be opened so that there is an open space

in front of and behind the bay window. At least one of these sliding sashes was missing on the day in question, thereby leaving an opening in the side of the cab.

Appellant seeks to impose liability on the Railroad under the Boiler Inspection Act, 45 U.S.C.S. § 22 *et seq.* which reads in pertinent part:

> "*Use of unsafe locomotives and appurtenances unlawful — Inspection and tests.* — It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. . . ."

While this section does not in itself grant a right of action to an employee, it has been held that the Boiler Inspection Act must be read in *pari materia* with the Federal Employers Liability Act, 45 U.S.C.S. 51 *et seq.* FELA requires a showing of at least some negligence on the part of the employer. The Boiler Inspection Act, however, eliminates the necessity of showing that negligence. If the plaintiff shows that any part or appurtenance of a locomotive is in a defective condition, the railroad is negligent per se, and the plaintiff then is only required to prove proximate cause. *Urie v. Thompson* (1949), 337 U.S. 163; *Lilly v. Grand Trunk Western Railroad* (1943), 317 U.S. 481. The acts are to be liberally construed in light of their humanitarian purpose of providing for the safety of the railroad employees. *Urie v. Thompson, supra.*

Appellant contends that the bay window is an appurtenance to the locomotive and that the missing sash made such appurtenance defective. For these reasons, appellant contends that the jury should have been instructed that if they found the bay window defective, they should have found that the Railroad was negligent per se; and that if

they found the defective appurtenance to be the proximate cause of the injury, they should have found for the plaintiff-appellant. The trial court refused to instruct the jury under the Boiler Inspection Act. The court instructed the jury under FELA and that they must first find the Railroad negligent in failing to provide a reasonably safe place to work.

The primary purpose of the Boiler Inspection Act is to provide for the safety of the employees. *Urie v. Thompson, supra.* The primary purpose of the bay window apparatus was to protect the engineer from the elements during the winter months. There was conflicting testimony as to whether these were also provided for the purpose of keeping thrown objects away from the engineers. However, in light of the union agreement which required the entire apparatus to be removed in the warmer months, and the testimony of plaintiff (Tr. 82), and the Railroad's security chief (Tr. 507) that the incidents of children trespassing and throwing stones increased in the warmer months, the argument that these windows were provided to protect the engineers from thrown objects is not sound.

The question remains, however, as to whether these bay windows are "appurtenances" to the locomotive. The language of the Boiler Inspection Act must be liberally construed in light of its humanitarian purposes. *Urie v. Thompson, supra.* The act requires locomotives to be in proper condition and safe to operate without unnecessary peril to life or limb. The determination of whether something is an appurtenance to a locomotive is whether such device is an integral part of the locomotive's use and essential to its operation. *Southern Railway Co. v. Bryan* (5th Cir. 1967), 375 F.2d 155; *Seaboard Coast Line Railroad v. Jackson* (Fla. App. 1971), 256 So.2d 568; *Zollinger v. Pittsburgh and Lake Erie Railroad* (W.D. Pa. 1972), 337 F.Supp. 913. It has also been held that where a device is issued by the railroad and is widely and routinely used, it becomes an appurtenance, *Duchsherer v. Northern Pa-*

cific Railway (Wash. App. 1971), 481 P.2d 929. The act provides protection against the presence of dangerous objects or foreign matter, *Gowins v. Pennsylvania Railroad* (6th Cir. 1962), 299 F.2d 431. The courts have found liability under the act where a lifting eye broke, *Southern Railway v. Bryan, supra;* where oil had accumulated on the locomotive's steps, *St. Louis Southwestern Railway v. Williams* (5th Cir. 1968), 397 F.2d 147; *Gowins v. Pennsylvania Railroad, supra;* where a radio was defective, *Seaboard Coast Line Railroad v. Jackson, supra;* where a push-pole broke, *Zollinger v. Pittsburgh and Lake Erie Railroad, supra;* and where a turntable fell off of a motorcar causing it to overturn, *Duchsherer v. Northern Pacific Railway, supra.* In each of those cases, there was a determination that the defect was to a device which was integral to the use of the locomotive. Here, the evidence was to the contrary. The evidence was that these windows were installed for only part of the year and that they were required to be removed for the rest of the year. This removal requirement in the union agreement demonstrates that despite their wide and routine use, they were not an integral part of the locomotive nor essential to its use.

We conclude that the bay window was not an appurtenance. The absence of the sliding sash, therefore, was not a defect which posed unnecessary peril to life or limb. The trial court did not err in refusing to instruct the jury that the absence of the sliding sash was negligence per se under the Boiler Inspection Act.

Appellant's first assignment of error is without merit.

For his second assignment of error, appellant states:

"II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO ALLOW PLAINTIFF TO PRESENT HIS REBUTTAL EXPERT WITNESS, CAPTAIN BELL, TO REBUT DEFENDANT-APPELLEE'S LINE OF DEFENSE THAT NOTHING COULD BE DONE ABOUT VANDALISM."

At the close of the defendant's case, plaintiff attempted to introduce the testimony of Captain Harry Bell of the Lyndhurst Police Department to rebut the testimony of Captain George Paul of the Railroad's security department. Captain Bell was introduced as an expert on the deployment of police personnel. The trial court conducted a voir dire of the witness before permitting him to testify. During the voir dire, the thrust of Captain Bell's testimony was that regardless of the available manpower, personnel could be redeployed to deal with "hot spots" that occurred. However, Captain Bell testified that the number of reports from this area prior to this incident would not classify it as a hot spot. On that basis, the trial court refused to permit Captain Bell to testify as a rebuttal witness.

Appellant argues that this testimony was needed to rebut Captain Paul's testimony that there was nothing that could be done about vandalism and trespassing. Captain Paul, however, merely testified that there was insufficient manpower on the Railroad security force to protect the crews from juveniles.

Generally, rebuttal is limited to evidence that denies or refutes evidence presented by the other party. *See Toledo and Ohio Central Railway v. Wales* (1896), 11 Ohio C.C. 371; Cleary, *McCormick on Evidence*, 2d Ed., p. 6. Here, appellant's rebuttal testimony did not deny or refute any evidence presented by the appellee. Captain Bell was presented as an expert to show that even with the limited manpower of the Railroad security force, the men could have been redeployed to cover "hot spots". He conceded, however, on voir dire that this was not a "hot spot". His testimony would not have rebutted any of appellant's evidence. The trial court properly excluded this testimony.

Appellant's second assignment of error is without merit.

For his third assignment of error, appellant states:

"III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO RULE ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY."

Pursuant to an agreement between the parties, appellant had requested certain documents from appellee pursuant to Civ. R. 34. On March 20, 1978, appellant filed a motion to compel discovery. Appellee responded with a brief in opposition. The record does not reflect that the trial court took any action on the motion.

The motion to compel sought the discovery of six items: 1) a CCA-112 employee injury or occupational illness work report; 2) written statement of James Rowe, 5/27/76; 3) written report of James Rowe, 8/29/77; 4) written statement of Lloyd G. Kifer, 5/26/76; 5) written statement of Raymond P. Idle, 5/26/76; and 6) written statement of William P. Graver, 5/27/76.

Item number one was given to appellant by appellee. The two statements of James Rowe were not used by appellee at trial, although appellant did cross-examine Rowe about these statements. The statements of Kifer and Idle were read into the record by the Railroad's claims agent without objection by appellant. No mention of the statement of Graver was made by either appellant or appellee.

Civ. R. 26(B)(3) states in part:

". . . [A] party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor . . . ."

All of the statements sought by appellant are clearly statements taken by appellee in anticipation of litigation. Pur-

suant to Civ. R. 26(B)(3) these are discoverable only for good cause shown. Attached to his motion to compel was a brief in which appellant stated, as his primary reason for seeking the statements, that the appellee had voluntarily revealed that these statements were taken in response to appellant's interrogatories. Appellant did not demonstrate good cause. Absent such a showing, these statements were not discoverable.

In addition, appellant by his own actions waived his right to raise this on appeal. The record does not reflect that appellant pointed out the trial court's failure to rule on the motion prior to trial. Nor does the record reflect that appellant sought sanctions or a continuance so that discovery could be had. Instead, appellant proceeded to trail and allowed two of the statements to be read into the record without objection. The other three statements were not used by appellee. Appellant may not now raise these issues on appeal.

Appellant's third assignment of error is without merit.

For his fourth assignment of error, appellant states:

> "IV. THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THAT DEFENDANT RAIROAD WAS NEGLIGENT IF IT COULD HAVE DONE MORE THAN IT DID TO ALLEVIATE THE ALREADY KNOWN AND FORESEEABLE DANGERS OF VANDALS THROWING ROCKS, AS PER PLAINTIFF'S THIRD PAGE OF REQUESTED INSTRUCTIONS (T. 699)."

Page three of appellant's requested jury instructions is entitled "Issues to be Presented to the Jury". In relation to the appellee's duty to provide a safe place to work under FELA, appellant requested the following language: "Could Defendant railroad have done more than it did to alleviate the already known and foreseeable dangers of vandals throwing rocks." A discussion was had between the trial court and counsel for both parties as to the in-

structions. The trial court indicated it would not use that exact language. Having made his position reasonably clear to the trial court, it was not necessary for appellant to formally object to the charge at the conclusion of the instructions. *Presley v. Norwood* (1973), 36 Ohio St. 2d 29.

Our analysis must turn to whether appellant's requested instruction was a correct statement of the law. We conclude that it was not.

This requested charge states that the Railroad needs to respond more to a *known and foreseeable danger* of vandals throwing rocks. Here, the Railroad's security chief testified that in the three previous years, there had been reports of one stoning incident and three incidents of trespassing in the West 42nd Street area. This cannot, as a matter of law, be said to constitute a "known and foreseeable danger". Because appellant's requested definition of negligence was an incorrect statement of the law, the trial court did not err in not so instructing the jury.

Appellant's fourth assignment of error is without merit.

For his fifth assignment of error, appellant states:

"V. THE TRIAL COURT AS A MATTER OF LAW GAVE MISLEADING, IMPROPER AND INADEQUATE JURY INSTRUCTIONS."

Appellant alleges that the trial court's instruction to the jury on negligence was confusing and incorrect. Appellant, however, failed to object to the court's charge as required by Civ. R. 51(A). The failure of a party to specifically object to the charge of the trial court prevents that party from raising those issues on appeal. *Hensler v. B. & O.* (1973), 39 Ohio App. 2d 146; *Faulkner v. Pezeshki* (1975), 44 Ohio App. 2d 186.

Appellant's fifth assignment of error is without merit.

For his sixth assignment of error, appellant states:

"VI. THE COURT ERRED IN ALLOWING INTO EVIDENCE THE UNSIGNED STATEMENT

PURPORTED TO BE BY PLAINTIFF, BUT WHICH WAS IN FACT PREPARED BY THE RAILROAD'S CLAIM AGENT AND REFUTED AT ALL TIMES BY THE PLAINTIFF."

Appellant contends that his unsigned statement to the Railroad claims agent should not have been admitted because he refused to sign it after he read it. Appellant objected to the admission of this document because there was nothing to identify it as the statement of appellant. (Tr. 518, 519). However, during the direct examination of R. S. Hayth, the Railroad's claims agent, the document was identified as the statement given by appellant at appellant's home. Appellant's failure to sign the statement was not explained by Hayth.

The entire statement was read to the jury by Hayth without objection by appellant's counsel (Tr. 341-344). Whatever objections appellant had to the admission of this evidence was waived by appellant's failure to object to the reading of the statement by Hayth. If error, it was harmless error to admit the statement into evidence since it had been read to the jury.

Appellant's sixth assignment of error is without merit.

For his seventh assignment of error, appellant states:

"VII. THE TRIAL COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S INSTRUCTIONS 2.-a,b,c ON SAFE PLACE TO WORK, THEREBY REFUSING TO INSTRUCT THAT SAFE PLACE TO WORK INCLUDES ALL OF THE SURROUNDING PREMISES AND INCLUDES DANGER FROM CRIMINAL ATTACK."

Appellant's requested instructions 2. a, b, c read:

"a. The railroad has a continuing non-delegable duty to use reasonable care to make the locomotive, all

of its instrumentalities and appliances, as well as the premises generally safe for all uses for which it is intended or permitted in the course of the employee's duties, regardless of whether the danger was from criminal attack and regardless of whether the employee knew of the danger.

"b. If the railroad failed in its duty to provide a safe place to work, then it is negligent.

"c. If the railroad's negligence played any part, even the slightest, in producing the injury for which damages are sought."

Section (a) is a proposed instruction on appellee's duty. As discussed under assignment of error No. I, the facts of this case do not bring it under the Boiler Inspection Act whereby a violation of the act would be negligence per se. This case was properly submitted to the jury only as an FELA case. The basis for recovery under FELA* is negligence. *See Urie v. Thompson, supra.*

In its instructions to the jury, the trial court instructed the jury on the elements of negligence (Tr. 675-677); read to the jury the applicable portion of the FELA (Tr. 678); instructed the jury that the employer was under a continuing duty to provide a reasonably safe place to work under all the circumstances (Tr. 678, 679); and instructed the jury that it could consider the agreement to provide bay windows as one of the factors in determining whether there was a safe place to work (Tr. 679).

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*FELA, 45 U.S.C. § 51 reads in part: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . ."

In considering whether there was a reasonably safe place to work, the jury was instructed that even if the negligence of the Railroad combined with another cause (the throwing of stones by unknown trespassers), the Railroad could still be found liable (Tr. 680, 681). This, in effect, incorporates the same ideas proposed by the appellant in proposed instruction 2a. In addition, appellant's requested instructions 2b and 2c were substantially covered by the trial court's instructions. It is not error for a trial court to refuse to give requested instructions that are substantially covered by other instructions. *Hardy v. Crabbe* (1961), 114 Ohio App. 218.

Appellant's seventh assignment of error is without merit.

For his eighth assignment of error, appellant states:

> "VIII. THE TRIAL COURT ERRED IN USURPING THE JURY'S FUNCTION BY TREATING THE CASE AS A NEGLIGENCE CASE FROM THE INCEPTION OF THE TRIAL, SUCH ACTION BEING TANTAMOUNT TO A GRANTING OF SUMMARY JUDGMENT AND TAINTING THE ENTIRE PROCEDURE BY REFUSING TO ALLOW PLAINTIFF TO DIRECT THE JURY'S ATTENTION TO VITAL ISSUES PROPERLY BEFORE IT."

Prior to the commencement of trial, a discussion was had concerning defendant-appellee's motion in limine requesting that the plaintiff not be permitted to mention the agreement that required the bay windows. Appellee based this motion on the argument that windows were not safety appliances. The court overruled the motion, but instructed the plaintiff-appellant that he could not specifically mention the Boiler Inspection Act in his opening statement, although he could mention the agreement and the failure to have the windows in correct working order.

Appellant contends that the trial court in effect granted summary judgment on the issue of the Boiler Inspection Act before any evidence was heard. Appellant's contention is wholly without merit.

As discussed under assignment of error No. I, the FELA requires a showing of negligence on the part of the Railroad, which negligence must be a proximate cause of the injury. However, if a violation of the Boiler Inspection Act is shown, this is negligence per se and only proximate cause need be shown. *Urie v. Thompson, supra.* In overruling the motion in limine, the trial court stated at 14:

> "THE COURT: At the present time, I am going to overrule your Motion in Limine. I am not saying, though, at this time, for your purpose, Mr. Bernsteen, I am going to instruct the jury regarding a violation of the Boiler Inspection Act there is going to be per se violation of FELA.
>
> "As I think right now, and I have not heard all the evidence, that I may at one point finally tell the jury, after we hear all the evidence. This may be something they may consider in determining whether or not there is a violation."

The court further stated at 17, 18:

> "THE COURT: I am never going to tell the jury I don't think that it is a violation, I am not prepared to say that at all. I agree with you on — part of my thinking is right now, a violation of the Boiler Inspection Act.
>
> * * *
>
> "THE COURT: Well, there isn't any basis upon which someone is going to be allowed to testify whether or not it was a violation of that Act, no witness is ever allowed to make that determination."

It is clear from these statements that the trial court in overruling appellee's motion in limine considered the Boiler

Inspection Act to be at issue in the case. He merely desired to have the definition of what is or is not a violation of said act saved for his instructions to the jury, provided that there was sufficient evidence of such violations to warrant such an instruction.

In addition, appellant alleges that: "The court frequently and obstrusively conducted its own biased examination of witnesses and came to its own factual conclusions as to these witnesses which cause[sic] the Court to make improper rulings on the law and usurped the jury's function."

In support of this statement, appelant cites only the questioning of Arthur Black by counsel for appellee. (Tr. 452-461). The only comments of the trial court in those pages are rulings on the objections of appellant's counsel. Specifically, appellent alleges that the court asked improper questions of the witness at Tr. 458. The record reflects that the court sustained two objections of appellant and overruled one objection at Tr. 458. The record reflects that the court asked no questions of the witness at Tr. 458.

Appellant's eighth assignment of error is wholly unsupported by the record.

For his ninth assignment of error, appellant states:

> "IX. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN PLAINTIFF'S FAVOR UNDER THE BOILER INSPECTION ACT."

At the close of all of the evidence, appellant moved for a directed verdict on the Boiler Inspection Act pursuant to Civ. R. 50(A). As discussed under assignment of error No. I, the bay windows are not an appurtenance under the Boiler Inspection Act. Therefore, even if appellant had proven that the windows were in a defective

condition, he was not entitled to a directed verdict on the Boiler Inspection Act.

Appellant's ninth assignment of error is without merit.

For his tenth assignment of error, appellant states:

> "X. THE TRIAL COURT ERRED WHEN IT REPEATEDLY BROUGHT UP THE SUBJECT OF CONTRIBUTORY NEGLIGENCE, THEREBY PREJUDICING PLAINTIFF'S CASE, BECAUSE CONTRIBUTORY NEGLIGENCE IS NOT PROPERLY A DEFENSE."

The Federal Employers' Liability Act, by its own terms, provides that the contributory negligence of an injured employee shall be a partial defense to liability under FELA. 45 U.S.C.S. § 53 states:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [§ § 51-60 of this title] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is clear from the statute that if a jury finds that the employee is contributorily negligent, such negligence shall be considered in reaching a verdict. The damages must be diminished to the extent that the employee's negligence contributed to his own injury. This statute was read to the jury as part of its explanation of contributory negli-

gence. (Tr. 683). In addition, the trial court explained what the statute meant and how to apply it. (Tr. 683, 684).

At trial, there was some evidence elicited from which the jury could have reasonably concluded that plaintiff-appellant was himself negligent in failing to notify the Railroad of the children throwing stones, and that such negligence contributed to his injury. The trial court was correct in instructing the jury on contributory negligence. In addition, the court's instructions on contributory negligence under 45 U.S.C.S. § 53 were correct.

Appellant's tenth assignment of error is without merit.

For his eleventh assignment of error, appellant states:

"XI. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE JURY TO CONSIDER PRE-EXISTING CONDITIONS."

Appellant contends that the trial court's instructions to the jury at Tr. 688 were confusing and did not clarify pre-existing conditions. Civ. R. 51(A) requires a party to specifically request and specifically object to jury instructions. Absent such an objection, a party may not assert such instructions as error on appeal. *Hensler v. B. & O., supra; Faulkner v. Pezeshki, supra.* Appellant neither requested a charge on pre-existing conditions, nor did he raise any objections to the charge as given. Appellant, therefore, waived his objection to the charge.

Appellant's eleventh assignment of error is without merit.

Judgment of the trial court is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, J.,

KRUPANSKY, J., CONCUR

THOMAS J. PARRINO
Presiding Judge

For plaintiff-appellant:
HERBERT L. BERNSTEEN

For defendant-appellee:
FORREST A. NORMAN

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

J. G. CHISM
Plaintiff

v.

NORFOLK AND WESTERN RAILROAD COMPANY
Defendant

CASE NO. 977,710

JUDGE JAMES McMONAGLE

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, J. G. Chism, hereby appeals in the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District from the final judgment in favor of the Defendant entered on June 30, 1978.

Respectfully submitted,

HERBERT L. BERNSTEEN
Attorney for Plaintiff
1210 Standard Building
Cleveland, Ohio 44113
216/621-1865

SERVICE

A copy of the within has been mailed to Attorney for Defendant, Forrest A. Norman, 630 Bulkley Building, Cleveland, Ohio 44115, on the 24 day of July, 1978.

HERBERT L. BERNSTEEN
Attorney for Plaintiff

THE SUPREME COURT OF OHIO

THE STATE OF OHIO City of Columbus.	1980 TERM To wit: May 1, 1980
J. G. CHISM, *Appellant,* vs. NORFOLK AND WESTERN RAILWAY COMPANY, *Appellee.*	No. 80-339 **MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS** for Cuyahoga County **TO CERTIFY ITS RECORD**

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Deborah Purcell Goshien.

.....

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court

this ..... day of ..... 19 .....

..... Clerk

..... Deputy

SUPREME COURT OF THE UNITED STATES

No. A-46

J. S. CHISM,
Petitioner,

v.

NORFOLK AND WESTERN
RAILWAY COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12, 1980.

/s/ POTTER STEWART
Associate Justice
of the Supreme Court
of the United States

Dated this 17th
day of July, 1980.

FEDERAL EMPLOYERS LIABILITY ACT

45 U.S.C. Sec. 51-60

CHAPTER 2. – LIABILITY FOR INJURIES TO EMPLOYEES

Sec.

51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
52. Carriers in Territories or other possessions of United States.
53. Contributory negligence; diminution of damages.
54. Assumption of risks of employment.
55. Contract, rule, regulation, or device exempting from liability; set-off.
56. Actions; limitation; concurrent jurisdiction of courts.
57. Who included in term "common carrier."
58. Duty or liability of common carriers and rights of employees under other acts not impaired.
59. Survival of right of action of person injured.
60. Penalty for suppression of voluntary information incident to accidents; separability of provisions.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1980, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence,

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.

§ 53. Contributory negligence, diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contribute to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 53 Stat. 1404.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Apr. 22, 1908, c. 149, § 5, 35 Stat, 66.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or

corporations charged with the duty of the management and operation of the business of a common carrier.

Apr. 22, 1908, c. 149, § 7, 35 Stat. 66.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any em-

ployee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.

BOILER INSPECTION ACT

45 U.S.C. Sec. 22-34

§ 22. Inspection of locomotives and appurtenances; definitions.

When used in sections 23 and 28 to 34 of this title, the terms "carrier" and common carrier" means a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in said sections shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in said sections shall be held to mean persons actually engaged in or connected with the movement of any train. (Feb. 17, 1911, ch. 103, § 1, 36 Stat. 913; June 7, 1924, ch. 355, § 1, 43 Stat. 659.)

References in Text

The Interstate Commerce Act, as amended, referred to in the text, is classified to chapters 1, 8, 12, 13, and 19 of Title 49, Transportation.

Transfer of Functions

All powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Depart-

ment of Transportation. See section 1655(e)(1) of Title 49, Transportation.

Boiler Inspection Acts

The following acts are commonly referred to as Boiler Inspection Acts:

Feb. 17, 1911, ch. 103, 36 Stat. 913. See sections 22-29, 31-34 of this title.

Mar. 4, 1915, ch. 169, 38 Stat. 1192. See section 30 of this title.

June 26, 1918, ch. 105, 40 Stat. 616. See sections 24-26 of this title.

June 7, 1924, ch. 355, 43 Stat. 659. See sections 22-27 of this title.

Apr. 22, 1940, ch. 124, 54 Stat. 148. See sections 24-34 of this title.

Section Referred to in Other Sections

This section is referred to in sections 29, 30, 34 of this title.

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests.

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this

title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913; Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192; June 7, 1924, ch. 355, § 2, 43 Stat. 659.)

TRANSFER OF FUNCTIONS

All powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(e)(1) of Title 49, Transportation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 22, 29, 30, 34 of this title.

§§ 24 to 27. Omitted.

CODIFICATION

Section 24, acts Feb. 17, 1911, ch. 103, § 3, 36 Stat. 914; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148; May 27, 1947, ch. 85, § 1, 61 Stat. 120; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972, provided for the appointment and salaries of a director of locomotive inspection and two assistant directors of locomotive inspection and is omitted pursuant to Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees, which abolishes the offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives. Acts June 26, 1918, ch. 105, 40 Stat.

616; June 7, 1924, ch. 355, § 6, 43 Stat. 639; June 27, 1930, ch. 644, § 1, 46 Stat. 822, which provided for the pay of chief inspector, assistant inspectors, and district directors of locomotives, and related to office allowances for each inspector, and which were formerly set out in the credit to section 24 of this title, were repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 643, 646, 648.

Section 25, acts Feb. 17, 1911, ch. 103, § 3, 36 Stat. 914; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148; May 27, 1947, ch. 85, § 1, 61 Stat. 120, provided for the location of the office of the director of locomotive inspection in Washington, D.C., and for the staffing of such office, and is omitted pursuant to Reorg. Plan No. 3 of 1965.

Section 26, acts Feb. 17, 1911, ch. 103, § 4, 36 Stat. 914; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148; May 27, 1947, ch. 85, § 2, 61 Stat. 120, directed the director of locomotive inspection to divide the country into 50 locomotive boiler inspection districts so as to most effectively divide up the work of the inspector for each such district and is omitted pursuant to Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees, which abolished the offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts. Acts June 26, 1918, ch. 105, 40 Stat. 616; June 27, 1930, ch. 644, § 2, 46 Stat. 823, which were formerly set out in the credit to section 26, were repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 643, 648.

Section 27, act. Feb. 17, 1911, ch. 103, § 4 (par), as added June 7, 1924, ch. 355, § 4, 43 Stat. 659, and amended Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148, authorized the appointment of 15 additional boiler inspectors over and above

the number authorized by section 26 of this title as the needs of the service may require, and is omitted pursuant to Reorg. Plan No. 3 of 1965.

§ 28. Rules and instruction as to inspection.

Each carrier subject to this chapter shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after February 17, 1911, and such rules and instructions shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this chapter shall fail to file its rules and instructions the director of locomotive inspection shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Secretary of Transportation. The director of locomotive inspection shall also make all needful rules, regulations and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Secretary of Transportation before they take effect. (Feb. 17, 1911, ch. 103, § 5, 36 Stat. 914; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.)

CODIFICATION

Provision for the holding of hearings and approval by the Interstate Commerce Commission with reference to the rules and instruction filed by the carriers within three

months after Feb. 17, 1911, and provision for the modification of such filed rules and instructions as required by the Commission, have been omitted as executed.

Amendments

1940 — Act Apr. 22, 1940, substituted "director of locomotive inspection" for "chief inspector" in two instances.

Transfer of Functions

The Secretary of Transportation was substituted for the Interstate Commerce Commission pursuant to Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation and transferred all powers, duties and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers to the Secretary of Transportation. See section 1655(e)(1)(E) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

Section Referred to in Other Sections

This section is referred to in sections 22, 23, 29, 30, 34 of this title.

§ 29. Duties of district inspectors; inspection and repairs by carriers; notice to carrier of condition of boiler; appeal to director and reexamination; further appeal to Secretary.

It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the director of locomotice inspection or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of sections 22, 23, 28, 29 and 31 to 34 of this title, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Secretary of Transportation, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to said sections shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore

stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided,* That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the director of locomotive inspection by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the director of locomotive inspection shall assign one of the assistant directors of locomotive inspection or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the director of locomotive inspection shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector the director of locomotive inspection shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Secretary of Transportation, and upon such appeal, and after hearing, said Secretary shall have power to revise, modify, or set aside such action of the director of locomotive inspection and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further,* That pending either appeal the requirements of the inspector shall be effective. (Feb. 17, 1911, ch. 103, § 6, 36 Stat. 915; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.)

AMENDMENTS

1940 — Act Apr. 22, 1940, substitued "director of locomotive inspection" and "assistant directors of locomotive

inspection" for "chief inspector" and "assistant chief inspectors" wherever appearing.

Transfer of Functions

The Secretary of Transportation was substitued for the Interstate Commerce Commission pursuant to Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation and transferred all powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof under this section relating to safety appliances and equipment of railroad engines and cars and the protection of employees and travelers to the Secretary of Transportation. See section 1655(e)(1)(E) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

Section Referred to in Other Sections

This section is referred to in sections 22, 23, 30, 34 of this title.

§ 30. Powers and duties of inspectors, and provisions of certain sections applicable to all parts of locomotive and tender; examinations of inspectors.

The director of locomotive inspection and the two assistant directors of locomotive inspection, together with

all the district inspectors, appointed as hereinbefore provided, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they have with respect to the boiler of a locomotive and the appurtenances thereof, and the provision of sections 22, 23, 28, 29, and 31 to 34 of this title as to the equipment of locomotives shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it applies to locomotive boilers and their appurtenances. All inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed. (Mar. 4, 1915, ch. 169, § 2, 38 Stat. 1192; Apr. 22, 1940, ch. 124, § 2, 54 Stat. 148.)

AMENDMENTS

1940 — Act Apr. 22, 1940, substituted "director of locomotive inspection" for "chief inspector" wherever appearing.

TRANSFER OF FUNCTIONS

All powers, duties, and functions of the Interstate Commerce Commission and of the Chairman members, offices and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(e)(1) of Title 49, Transportation.

·· The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts,

were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 22, 23, 34 of this title.

§ 31. Annual report of director.

The director of locomotive inspection shall make an annual report to the Secretary of Transportation of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire. (Feb. 17, 1911, ch. 103, § 7, 36 Stat. 916; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.)

AMENDMENTS

1940 — Act Apr. 22, 1940, substituted "director of locomotive inspection" for "chief inspector" wherever appearing.

TRANSFER OF FUNCTIONS

The Secretary of Transportation was substituted for the Interstate Commerce Commission pursuant to Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation and transferred all powers, duties, and functions of the Interstate Commerce Commission and the Chairman, members, offices, and officers thereof under this section relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers to the Secretary of Transportation. See section 1655(e)(1)(E) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 22, 29, 30, 34 of this title.

§ 32. Report by carrier to director as to accident; preservation of disabled parts; investigation and report thereupon.

In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the director of locomotive inspection. Whereupon the facts concerning such accident shall be investigated by the director of locomotive inspection or one of his assistants, or such inspector as the director of locomotive inspection may designate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The director of locomotive inspection or an assistant or the designated inspector mak-

ing the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the director of locomotive inspection. (Feb. 17, 1911, ch. 103, § 8, 36 Stat. 916; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.)

AMENDMENTS

1940 — Act Apr. 22, 1940, substituted "director of locomotive inspection for "chief inspector" wherever appearing.

TRANSFER OF FUNCTIONS

All powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, Oct 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a)(1) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 22, 23, 29, 30, 33, 34 of this title.

§ 33. Reports by Secretary of investigations.

The Secretary of Transportation may at any time call upon the director of locomotive inspection for a report of any accident embraced in section 32 of this title, and upon the receipt of said report, if he deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as he deems proper. Such reports shall be made public in such manner as the Secretary deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation. (Feb. 17, 1911, ch. 103, § 8, 36 Stat. 916; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.)

AMENDMENTS

1940 — Act Apr. 22, 1940, substituted "director of locomotive inspection" for "chief inspector" wherever appearing.

TRANSFER OF FUNCTIONS

The Secretary of Transportation was substituted for the Interstate Commerce Commission pursuant to Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation and transferred all powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers to the Secretary of Transportation. See section 1655(e)(1)(E) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing

the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 22, 29, 30, 34 of this title.

§ 34. Penalty for violations by carrier; duty of United States attorney to sue therefor; director to give information.

Any common carrier violating the provisions of sections 22, 23, and 28 to 34 of this title relating to locomotives, their boilers, tenders, and so forth, or any rule or regulation made under such provisions or any lawful order of any inspector shall be liable to a penalty of $250 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the director of locomotive inspection to give information to the proper United States attorney of all violations coming to his knowledge. (Feb. 17, 1911, ch. 103, § 9, 36 Stat. 916; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Aug. 14, 1957, Pub. L. 85-135, § 3, 71 Stat. 352.)

Amendments

1957 – Pub. L. 85-135 substituted "$250" for "$100".

1940 – Act Apr. 22, 1940, substituted "director of locomotive inspection" for "chief inspector" and struck out "of locomotive boilers".

Transfer of Functions

All powers, duties, and functions of the Interstate Commerce Commission and of the Chairman, members, offices, and officers thereof relating to safety appliances and equipment on railroad engines and cars and the protection of employees and travelers were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(e)(1) of Title 49, Transportation.

The offices of director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives, together with the function of the director of locomotive inspection with respect to dividing the territory comprising the several states and the District of Columbia into 50 locomotive boiler-inspection districts, were abolished and all other functions transferred to the Interstate Commerce Commission by Reorg. Plan No. 3 of 1965, eff. July 27, 1965, 30 F.R. 9351, 79 Stat. 1320, set out in the Appendix to Title 5, Government Organization and Employees.

Change of Name

Catchline amended by act June 25, 1948, eff. Sept. 1, 1948, which substituted "United States attorney" for "district attorney". See section 541 of Title 28, Judiciary and Judicial Procedure.

Section Refferred to in Other Sections

This section is referred to in sections 22, 29, 30 of this title.

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No. 80-423

In the Supreme Court of the United States

October Term, 1980

J. G. CHISM,
Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT CUYAHOGA COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Statement of Facts 1

Reasons for Denying the Writ 4

I. A Trial Court Properly Refuses to Instruct the Jury on the Federal Boiler Inspection Act When the Evidence Adduced Shows No Violation of Said Act and Establishes That the Act Is Inapplicable to the Factual Situation 4

II. A Party May Not Challenge the Giving of or the Failure to Give Any Jury Instruction Unless He Objects Thereto Before the Jury Retires to Consider Its Verdict, Stating Specifically the Matter to Which He Objects and the Grounds of His Objection 10

Conclusion 13

Service 14

TABLE OF AUTHORITIES

Cases

Brady v. Southern Railway Co., 320 U.S. 476 (1943) 4

Eckenrode v. Pennsylvania Railroad Co., 335 U.S. 329 (1948) 4

Iannacito v. Denver & Rio Grande Western Railroad, 380 F.2d 1019 (10th Cir. 1967) 11

Lilly v. Grand Trunk Western Railroad, 317 U.S. 481 (1943) 9

Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 182 Minn. 362, 234 N.W. 474 (1931), *cert. denied*, 283 U.S. 847 (1931) 8

Presley v. Norwood, 36 Ohio St. 2d 29, 303 N.E.2d 81 (1973) 11
Smith v. Illinois Central Railroad Co., 486 F.2d 943 (5th Cir. 1973) 4, 10
Southern Railway Co. v. Lunsford, 297 U.S. 398 (1936) 7, 9
Urie v. Thompson, 337 U.S. 163 (1949) 5

Statutes, Rules and Regulations

45 U.S.C. §23 (The Federal Boiler Inspection Act) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
Federal Employers Liability Act 2, 3, 6
Ohio R. Civ. P. 51(A) 11, 13
C.F.R. §§230.00-230.458 ..... 6, 7, 9

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STATEMENT OF FACTS

The Respondent must initially apologize for the rather lengthy dissertation of facts which follows. However, in light of the basis on which Petitioner institutes this appeal, it is important that further clarification and additional facts be provided.

The incident giving rise to this lawsuit occurred on May 18, 1976, when the Petitioner, a locomotive engineer, and members of his crew were either setting off or picking up cars at the West 42 Street team track. (A "team track" is a track that runs off of the main track and is used to hold cars temporarily.)

The Petitioner claims that while he was engaged in his work some small boys threw stones or gravel at the locomotive. One of the small pieces of stone or gravel apparently struck him in the eye. The incident gave all indication of being fairly insignificant.

The Petitioner brought this action against the Respondent railroad alleging violations of the Federal Employers Liability Act and the Federal Boiler Inspection Act.

Petitioner's claim under the Federal Boiler Inspection Act was predicated wholly upon the fact that the sliding sash in the bay window on the engineer's side of the engine had been removed. These sliding sashes had been installed pursuant to an agreement between the railroad and the union that was entered into in 1959. This agreement requires bay windows to be provided from October to June of each year, with the union insisting that said windows be removed by June 1. Inasmuch as it is a physical impossibility to remove bay windows from 1,600 locomotives at the stroke of midnight on May 31, it was customary procedure for the railroad to start removing these bay windows around the middle of May each year. This was accomplished with the definite approval and insistence of the union.

The evidence presented during the course of the trial conclusively demonstrated that the sole purpose of the bay window is to protect the engineer from adverse weather conditions, and the window was never considered to be a safety feature. Although there was testimony by the Petitioner that the bay window could provide protection from foreign objects, there was no evidence adduced that the bay windows were designed or implemented for any purpose other than the protection of the union employees from inclement weather. Furthermore, it must be emphasized that the bay windows are not required

by the Federal Boiler Inspection Act or any federal regulation, and are not utilized on the Respondent's locomotives except during the winter months.

At the conclusion of the presentation of the evidence, the trial court held that as a matter of law the Federal Boiler Inspection Act was inapplicable, and refused to submit jury instructions concerning liability under the said Act. The trial court then proceeded to instruct the jury on liability under the Federal Employers Liability Act. The Petitioner did not object to the trial court's jury instructions, or to its alleged failure to instruct the jury on the Federal Boiler Inspection Act. The jury subsequently returned a unanimous verdict in favor of the Respondent railroad.

Petitioner initially appealed this decision to the Ohio Court of Appeals asserting that the trial court had erred in refusing to allow the jury to consider liability under the Federal Boiler Inspection Act. The Ohio Court of Appeals affirmed the trial court's decision, ruling that under established law the bay window was not an appurtenance of the Respondent's locomotive, and that the Federal Boiler Inspection Act was inapplicable to the instant case.

Petitioner then filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court overruled Petitioner's appeal.

Petitioner has now petitioned this Court to grant a Writ of Certiorari. As shall appear hereafter, the Petition presents no federal question or true conflict between the state court's decision and the decisions of the federal courts, but merely expresses the Petitioner's dissatisfaction with the outcome of his case in the courts of the State of Ohio.

REASONS FOR DENYING THE WRIT

I. A TRIAL COURT PROPERLY REFUSES TO INSTRUCT THE JURY ON THE FEDERAL BOILER INSPECTION ACT WHEN THE EVIDENCE ADDUCED SHOWS NO VIOLATION OF SAID ACT AND ESTABLISHES THAT THE ACT IS INAPPLICABLE TO THE FACTUAL SITUATION.

Petitioner's position that the refusal to submit to the jury the issue of the Federal Boiler Inspection Act does not comport with federal decisions has absolutely no basis. On the contrary, the decision by the Ohio trial court is in complete accord with the decisions by this Court and the federal judicial system. *See Eckenrode v. Pennsylvania Railroad Co.*, 335 U.S. 329 (1948); *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973).

When the evidence presented by a litigant is clearly insufficient to demonstrate a violation of a federal statute, it is the unquestioned legal obligation of the trial court to remove that issue from the jury's consideration to prevent the possible miscarriage of justice. *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973). This Court recognized the above-mentioned principle of law in *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943), stating:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judg-

> ment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-80.

Under the facts presented in the case at bar, the trial court properly refused to charge on the Federal Boiler Inspection Act because the Petitioner failed to prove a violation of the Act, and because the Act is simply inapplicable to the lawsuit.

The Federal Boiler Inspection Act, 45 U.S.C. § 23, reads in its entirety as follows:

> Section 23. *Use of unsafe locomotives and appurtenances unlawful; - inspection and tests*
>
> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

The Federal Boiler Inspection Act does not purport to confer any right of action upon injured employees. *Urie v. Thompson*, 337 U.S. 163 (1949). It merely makes violations of its provisions "unlawful." Only when there has been a violation of the well-defined provisions of this Act

does the Act become relevant to an injured employee's action under the Federal Employers Liability Act. In these limited circumstances, the Federal Boiler Inspection Act imposes upon railroads "an absolute and continuing duty" to provide safe equipment.

Originally, the Interstate Commerce Commission had the authority for establishing rules and regulations pertaining to equipment on locomotives. In 1966, when the Department of Transportation was created, the provisions relating to safety appliances and equipment on railroad engines and carriers were transferred to the Secretary of Transportation. Presently, regulations pertaining to locomotives and equipment they must contain are found in the Code of Federal Regulations; specifically 49 C.F.R. §§ 230.00-230.458. In the case at bar, there was no evidence whatsoever of any violation of 45 U.S.C. § 23, and no evidence of any violation of any federal regulation.

The entire thrust of Petitioner's argument with respect to the applicability of the Federal Boiler Inspection Act is the fact that bay windows that were installed *pursuant to an agreement with the union during the winter months* had been removed. The accident occurred on May 18, 1976. Petitioner claims that the bay windows should not have been removed until June 1. (Parenthetically, Respondent would merely point out how specious Petitioner's argument really is. How something can be a violation of the Federal Boiler Inspection Act on May 18 but not be a violation of the Act two weeks later has never been explained.)

The fact of the matter is that the agreement between the railroad and the union is that the bay windows be removed during the summer months. In fact, the long-recognized practice of the railroad, at the insistence of the union, has been that the bay windows should be in-

stalled during the winter months and removed *"by June 1."* Furthermore, the evidence established that it is customary procedure for the railroad to begin removing the bay windows in the middle of May so as to have completed the task by June 1, and this is accomplished with the approval of the union. Therefore, if the bay windows had been actually removed from the locomotive on May 18, it was done with the concurrence of the union and in violation of no regulation.

Although the preceding discussion is important to demonstrate that the Respondent acted legitimately in removing the bay windows, it must also be stressed that there is *absolutely no federal requirement to have bay windows on a locomotive.* The Code of Federal Regulations, and specifically 49 C.F.R. §§ 230.00-230.458, sets forth the applicable rules and regulations for railroad engines. There is no requirement therein that locomotives be equipped with bay windows. *Respondent can find absolutely no legal authority, and there has been no case cited to this Court by the Petitioner, wherein the absence of an item that is not required by the Code of Federal Regulations constitutes a violation of the Federal Boiler Inspection Act.*

The most similar case Respondent can find rendered by this Court is *Southern Railway Co. v. Lunsford,* 297 U.S. 398 (1936). In that case, the railroad had put on a mechanism known as Wight's Little Watchman as a safety device. An accident occurred in which the mechanism failed properly to stop the train. Plaintiff alleged that the device was an "appurtenance" and since it did not work, there was a violation of the Federal Boiler Inspection Act. In its opinion, this Court stated as follows:

> We are unable to accept this view. With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for ex-

> perimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

Id. at 402.

Cf. *Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 182 Minn. 362, 234 N.W. 474 (1931), *cert. denied*, 283 U.S. 847 (1931). In that case, the railroad had installed curtains over the windows in the locomotive but had failed to provide a tie-back mechanism for the curtains, none being required by the Interstate Commerce Commission. Plaintiff was injured when the curtains interfered with his duties, and he instituted an action under the Federal Boiler Inspection Act alleging that the curtains should have had a tie-back mechanism. The trial court granted judgment for the railroad after opening statements and thus refused to submit the case to the jury. The Supreme Court of Minnesota affirmed, stating:

> Plaintiff is here attempting to have a jury say that defendant is negligent in failing to install equipment in addition to that required by the Commission. We think this cannot be done. We are of the opinion that when the carrier complies with the requirements of the Interstate Commerce Commission, as it has done here, and therefore the act of Congress, it cannot be found guilty of actionable negligence because the plaintiff

> or a jury might think ordinary care required something additional.

Id. at 364, 234 N.W. at 476.

Therefore, Respondent contends that the applicable legal authority supports the position that the *absence* of an item that is not required by the Code of Federal Regulations cannot constitute a violation of the Federal Boiler Inspection Act, and should not be submitted as such for the jury's consideration.

It is also obvious that the reason that bay windows are required during the winter months is to protect the engineers from inclement weather. There was no evidence that these windows were designed, implemented, or supposed to be a safety feature. If the bay windows were a safety feature, they would certainly be required during the summer months. The bay windows, as such, cannot be considered an integral and essential feature of the locomotive, and thus, not an appurtenance thereto. *Southern Railway Co. v. Lunsford,* 297 U.S. 398 (1936).

The cases relied upon by the Petitioner in his Petition for a Writ of Certiorari are dissimilar and distinguishable from the case at bar. None of the authorities cited by the Petitioner pertains to liability under the Federal Boiler Inspection Act where there is an absence of an item not required by the Code of Federal Regulations. The pertinent cases cited by Petitioner deal with situations in which essential operating equipment of the locomotive has been alleged defective, or where there has been an allegation that a specific federal regulation was violated. For instance, the Petitioner relies heavily upon the case of *Lilly v. Grand Trunk Western Railroad,* 317 U.S. 481 (1943). In that case, this Court found that a jury could rightfully find for the plaintiff because a specific regula-

tion passed by the Interstate Commerce Commission had been violated. However, a clearly different situation obtains in the case at hand. The Petitioner has failed to establish a violation of the Federal Boiler Inspection Act, and the evidence adduced showed conclusively that the Act was inapplicable to the lawsuit.

Where there is no evidence to support an instruction on the Federal Boiler Inspection Act, the state trial court properly refuses to give such an instruction. *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973). Such a decision is unquestionably in accordance with, and in furtherance of, the decisions of this Court, the federal courts, and the intent of Congress in its promulgation of the Federal Boiler Inspection Act.

II. A PARTY MAY NOT CHALLENGE THE GIVING OF OR THE FAILURE TO GIVE ANY JURY INSTRUCTION UNLESS HE OBJECTS THERETO BEFORE THE JURY RETIRES TO CONSIDER ITS VERDICT, STATING SPECIFICALLY THE MATTER TO WHICH HE OBJECTS AND THE GROUNDS OF HIS OBJECTION.

Petitioner asks this Court for a Writ of Certiorari asserting that the state trial court should have instructed the jury on the Federal Boiler Inspection Act. As Respondent has already demonstrated, there is no basis for review in this Court because the trial court acted properly and in complete compliance with established law in refusing to provide such an instruction. Nevertheless, Respondent further submits that Petitioner should be estopped from presenting this Petition because he has waived his right to challenge the jury instructions under the applicable Ohio law.

Rule 51(A) of the Ohio Rules of Civil Procedure, similar to the corresponding Federal Rule, provides in relevant part:

> A party may not assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection.

See also, Iannacito v. Denver & Rio Grande Western Railroad, 380 F.2d 1019 (10th Cir. 1967).

The Ohio Supreme Court, in its interpretation of Rule 51(A), has admittedly held that a formal objection to the court's charge is not necessary where the record affirmatively shows that the trial court has been fully appraised of the correct law governing a material issue in dispute, and that the party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury. *Presley v. Norwood,* 36 Ohio St. 2d 29, 303 N.E.2d 81 (1973). However, the Ohio Supreme Court in that same decision ruled:

> A party whose request for jury instructions fails to embody the correct law governing an issue, and who otherwise fails to comply with Civ. R. 51(A), waives his right to question the trial court's charge upon appeal.

Id. at 29, 303 N.E.2d at 81.

In the case at bar, the Petitioner not only failed to object to the jury's charge, but also submitted proposed jury instructions that failed to embody the correct law governing the Federal Boiler Inspection Act. Thus, in accordance with the applicable Ohio legal authority, the Petitioner has waived his right to challenge the jury instructions.

During the discussion of the trial court's charge, prior to final arguments, the court advised Petitioner that it was not submitting the case to the jury under the Federal Boiler Inspection Act. Petitioner failed to object to this decision at that time, or at any other time before the jury retired to consider its verdict. At the conclusion of the trial court's jury instructions, the following colloquy occurred:

> THE COURT: Gentlemen, before I go any further with instructing the jury as to their procedure and explaining the verdict forms, is there anything by way of addition to, deletion or subtraction from the charge as given? What say the plaintiff?
>
> MR. BERNSTEEN: *I have none, your Honor. Thank you.*

Furthermore, the Petitioner's proposed jury instruction read as follows:

> 1. If you find all five (5) of the following:
>
> a. the bay window is a part or appurtenance of the locomotive;
>
> b. the bay window was defective;
>
> c. the defect made the locomotive unsafe to operate without unnecessary peril to life or limb;
>
> d. the Plaintiff was injured; and
>
> e. the defective bay window contributed to the injury;
>
> Then you must find for Plaintiff, bearing in mind that no notice of the defect or unsafe condition is necessary to Plaintiff's case.

This proposed jury instruction fails to correctly embody the law governing the Federal Boiler Inspection Act for several noticeable reasons. It makes absolutely no reference to the Federal Boiler Inspection Act and fails to embody the language of the Act. It makes no reference whatsoever to the burden of proof. In two places it discusses the bay window as being "defective," although there was absolutely no evidence in the case that the bay window was defective and the Act makes no reference to "defective" equipment.

Therefore, it is clear that Petitioner did not comply with Rule 51(A), and inasmuch as Petitioner's proposed jury instruction failed to embody the correct law pertaining to the Federal Boiler Inspection Act, Petitioner has waived his right to question the Ohio trial court's charge on this point.

CONCLUSION

The foregoing discussion demonstrates that Petitioner has no basis for invoking the jurisdiction of this Court. There is absolutely no conflict that exists between the result in the instant case and the decisions of the federal judiciary. When the evidence adduced showed no violation of the Federal Boiler Inspection Act, the trial court acted properly in refusing to submit the Act for the jury's consideration. Furthermore, because Petitioner failed to comply with Ohio procedural law, he has waived his right to challenge the jury instructions.

Petitioner's claims have been fully adjudicated in the courts of Ohio. Although he is obviously dissatisfied with the rulings of the Ohio courts, that is certainly no justification for a further appeal to this Court. It is therefore

respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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A copy of the foregoing Brief of Respondent in Opposition to Petition For a Writ of Certiorari was mailed to Herbert L. Bernsteen, and Deborah Purcell Goshien, Attorneys for Petitioner, Suite 712, 75 Public Square, Cleveland, Ohio 44113, on this 4th day of November, 1980.

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